United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7200

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7200

UNITED STATES COURT OF APPEALS
FILED
SEP 6 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VINCENT VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees,

—against—

FRANK T. SCAVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant.

BRIEF ON BEHALF OF INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS AND ITS SUBORDINATE BODY THE OFFSHORE DIVISION

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Docket No. 77-7200

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BRIEF ON BEHALF OF INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS AND ITS SUBORDINATE BODY THE OFFSHORE DIVISION

The Parties

The question of parties, as it is reflected in the caption, is confusing and misleading. It incorrectly suggests that Plaintiffs-Appellees are union members who have a dispute with their union and that the union appears as the Defendant-Appellant, through its International president, Frank T. Scavo. As will be seen from the discussion which follows, that is not the case.

Plaintiffs-Appellees are all members of the IOMM&P (hereinafter "Organization" or "Union") and its subordinate body, the Offshore Division.[1]

Plaintiff-Appellee, Gerald L. Johnson is the Executive Vice President of the organization and, as such, is the Assistant Executive Officer of the Offshore Division. The Plaintiffs-Appellees, Charles A. Hemming, and Orion A. Larson, are two of the three Offshore Division Vice Presidents. The Plaintiff-Appellee, Robert Thompson, is an Assistant Port Agent of the Offshore Division. Plaintiff-Appellee, Virgil Valentine, is a member of the Offshore Division.

The Plaintiffs-Appellees originally brought this action to enjoin SCAVO, the Defendant-Appellant herein (hereinafter SCAVO) from interfering with the submission of their membership petition, for a proposed amendment to the Offshore Division By-Laws, to the membership for a referendum vote.

The governing bodies of the Organization and its Offshore Division, considering the matter of Plaintiffs-Appellees' petition, ruled in favor of the Plaintiffs. Thus, the Offshore Division Executive Council, the governing

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[1] The International Organization of Masters, Mates & Pilots is a Union composed primarily of licensed deck officers serving aboard American Flag oceangoing passenger, cargo and tanker vessels; ship's officers serving on tugboats and other inland craft on the rivers, bays and sounds of the United States; and the pilots who navigate American and Foreign Flag vessels in and out of the various ports of the United States.

The Offshore Division of the Organization is one of the several subordinate bodies. The Offshore Division consists of Offshore, seagoing licensed deck officers in the American Merchant Marine and is by far the largest of the Organization's subordinate bodies. It contains the largest portion of the Organization's membership.

body of the Offshore Division, passed a resolution in support of the Plaintiffs-Appellees' petition. The International Convention, the Organization's "supreme authority" and highest governing body, considered the question of the Plaintiffs-Appellees' petition at its 63rd Annual Convention and passed Resolutions in support of the Plaintiffs-Appellees' position.

The entire matter was then adjudicated before the District Court below (hereinafter Judge Pierce), and thereafter before the Court of Appeals on SCAVO's Motion for Stay and Expedited Appeal. The District Court upheld the Plaintiffs-Appellees' position and the Court of Appeals denied SCAVO's Motion.

Throughout these proceedings, the Organization and its subordinate body, the Offshore Division, consistently appeared in support of the Plaintiffs-Appellees' position:

(a) at the February 3, 1977 application for a Temporary Restraining Order;

(b) at the February 17, 1977 hearing for a preliminary injunction;

(c) at the March 11, 1977 hearing for a permanent injunction, consolidated with a trial, pursuant to FRCP 65(a);

(d) at the May 3, 1977 argument before the Court of Appeals on SCAVO's Motion for a Stay and Expedited Appeal;

(e) at the May 19, 1977 hearing on Plaintiffs-Appellees' Motion for Compliance and Adjudication of Contempt.

The Organization and its Offshore Division have submitted numerous affidavits, memoranda, and proposed orders, in support of Plaintiffs-Appellees' position and in opposition to the position taken by SCAVO, including:

(a) a Memorandum, dated February 28, 1977, submitted prior to the March 11, 1977 trial;

(b) a Memorandum, dated April 28, 1977, submitted prior to the May 3, 1977 hearing before the Court of Appeals on Defendant-Appellant SCAVO's Motion for a Stay and Expedited Appeal.

SCAVO has chosen to appeal, not only from the Opinion and Order of Judge Pierce, but from the rulings of the Organization's governing bodies. His decision to appeal is a completely personal one and is in no way supported by the Organization or its Offshore Division.

Thus, SCAVO, although originally sued as International President and Chief Executive Officer of the Offshore Division, and listed thereas in this caption, is, in fact, appearing with his own personal counsel, Jaffe, Cohen, Crystal and Mintz, having consistently taken a position in opposition to the resolutions of the Organization's governing bodies, including the Offshore Division Executive Council and the International Convention.

The Organization and its Offshore Division, although not officially listed on the caption in the instant Appeal, are, in fact, Appellees, having consistently supported the Plaintiffs-Appellees' position. A request to clarify the caption in line with the relative positions of the parties was made prior to the Pre-Argument Conference with Nathaniel Fensterstock, Esq., Staff Counsel for the Court of Appeals on August 2, 1977. The request was opposed by counsel for SCAVO and it was therefore suggested by the Clerk of the Court of Appeals, Mr. A. Daniel Fusaro, that the proper procedure for such a change would be by Motion to the Court. This Motion was filed on August 19, 1977.

Further, there was an initial dispute as to counsel for the Offshore Division.[2] However, page 3 of the transcript (JA 73) clearly reflects that Marvin Schwartz, P.C. (hereinafter SCHWARTZ) appeared as counsel for the International and for the Offshore Division; that Tabak, Steinman & Mellusi (hereinafter TABAK) appeared for the plaintiffs; and that Jaffe, Cohen, Crystal & Mintz (hereinafter COHEN) appeared for the defendant, SCAVO and the appearances are so listed by the Court in its opinion. (JA 153).

Further, the Court, in its written Opinion and as part of its findings of fact, referred to Agenda Item 53, one of the International Convention's resolutions which confirmed the action of the Offshore Division Executive Council, and which helped the Court resolve the dispute.[3] (JA 159).

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[2] Just as Scavo claimed he had the sole and unrestricted right to send out referenda which would amend the Offshore Division By-Laws, Scavo also claimed the sole and unrestricted right to hire and fire counsel for the Offshore Division despite the express disapproval of the Offshore Division governing board, (The Offshore Division Executive Council) and the International Convention.

[3] Agenda Item 53: Confirmation of Offshore Division Executive Council action regarding legal counsel:

Be it resolved:

The Action of the International President in purporting to terminate the services of Marvin Schwartz and Barton M. Epstein as Counsel for the Offshore Division and purporting to retain the law firm of Jaffe, Cohen, Crystal and Mintz as General Counsel of the Offshore Division, set forth, among other places, in his letter of January 15, 1977, is contrary to the Offshore Division By-Laws and the International Constitution and the prior action of the General Executive Board on July 15, 1975 and is and therefore was illegal null and void and of no force and effect.

Statement of the Case

This case was first brought on before Judge Lawrence W. Pierce on February 3, 1977 by plaintiffs' "show cause" application for a Temporary Restraining Order.[4] The plaintiffs sought to restrain the defendant SCAVO from interfering with a membership Petition,[5] signed by more than 15% of the Offshore Division membership, which Petition would radically reduce the number of Union officials; effectuate substantial salary savings; and substantially reduce membership dues.[6] Johnson, Hemming, et al had initiated and circulated the Petition to

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[4] As stated in Judge Pierce's Opinion, this case is one of three actions which the Plaintiffs-Appellees have instituted against the defendant. Initially, the issues in these cases were the same. They all involve the interpretation of the same provisions of the International Constitution and the Offshore Division By-Laws (JA 153-154).

However, in one of the other actions, 77 Civ. 844, there are now two additional related issues. First there is the issue of SCAVO's right to hire the attorney for the Offshore Division (referred to in footnote 2, supra), and the additional issue of SCAVO's right to hire Offshore Division administrative assistants. As in the case of the Offshore Division attorney, SCAVO claims the unrestricted right to hire and fire and set the compensation of administrative assistants for the Offshore Division despite the express disapproval of the Offshore Division Executive Council and any other governing body including the International Convention.

SCAVO asserts these powers as part of his sole right to interpret the Offshore Division By-Laws. He ignores the express disapproval of the various governing bodies because he characterizes their opposition as illegal attempts to "amend the By-Laws."

[5] The precise nature of SCAVO's interference is set forth in the Statement of Facts, pp. 10-24, *infra*.

the Offshore Division membership and had obtained 843 signatures, slightly more than the required 15%.

Judge Pierce denied the Temporary Restraining Order on February 4, 1977, concluding that plaintiffs had failed to show irreparable harm since the delegates to the approaching International Convention had the power to review and correct SCAVO's interference with the 15% membership petition. The Organization's 63rd International Convention did meet in San Diego, California between February 7-14, 1977, and duly passed several relevant resolutions which will be more fully described in the Statement of Facts below.

Following the close of the International Convention, the case came on for a preliminary injunction hearing on February 14, 1977. The parties and their attorneys appeared and argued at length. The Court adjourned that hearing; set a new date, March 11, 1977, for a further hearing; and instructed the parties to prepare Memoranda of Law, and Proposed Findings of Fact and Conclusions of Law. On March 11, 1977, the hearing was reconvened, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court, on its own motion, and with the consent of all the parties, consolidated the hearing with the trial of the case on its merits.

At the trial, many stipulations were agreed to between the parties; the Court heard extensive argument; and all of the parties agreed that there were no disputed questions of fact. The decision was reserved, and thereafter by written Opinion No. 45705, dated March 14, 1977, the Court ruled for the plaintiffs and permanently en-

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[6] The Offshore Division By-Laws provide that proposed amendments may be submitted to membership vote by either a majority vote of the Offshore Division Executive Council, or by a Petition signed by 15% of the Division's members in good standing.

joined the defendant SCAVO from interfering with the 15% membership Petition.

Proposed Orders and Counter Orders were submitted by all counsel. Cohen, counsel for SCAVO, submitted a letter application for a stay pending appeal. On April 8, 1977, the Court denied SCAVO's application for a stay and also issued its own Order and Judgment directing SCAVO to comply with the Resolutions of the International Convention and to refrain from any action which was not in compliance with the International Constitution, the Offshore Division By-Laws and the Resolutions of the International Convention.

Thereupon, SCAVO filed his Notice of Appeal and on April 20, 1977, moved this Court for a Stay Pending Appeal and an Expedited Appeal. Following a hearing on May 3, 1977, the motion was denied by the Court's Order of May 5, 1977.[7]

In its Order denying SCAVO's Motion for a Stay and a Preference, the Court ordered the case remanded to the District Court for contempt proceedings.

Accordingly, on May 9, 1977, Plaintiffs-Appellees filed a Notice of Motion seeking SCAVO's compliance with the District Court's Order, and for a further Order finding SCAVO in contempt for his failure to abide by the District Court's Order which directed him to comply with the Resolutions of the International Convention.[8]

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[7] Before S. R. Waterman, C.J.J.; M. I. Gurfein, C.J.J. and M. J. Blumenfeld, D.J

[8] SCAVO had continued to refuse to comply with the International Convention's Resolution No. 85 which required that the 15% membership Petition, ". . . which was properly proposed by a Petition signed by members of the Offshore Division in good standing . . ." be forthwith sent out separately to the Offshore Division membership in a referendum ballot to be voted for on a "yes" or "no" basis.

On May 11, 1977, SCAVO filed a Cross Motion seeking "clarification" of the District Court's Order. At the hearing on May 19, 1977, before Judge Pierce on the Plaintiffs' contempt application, Judge Pierce resolved the problem by calling SCAVO to the stand and obtaining his sworn commitment that he would send out the plaintiffs' 15% membership Petition.

Thus, the 15% membership Petition was finally mailed to the Offshore Division members on May 24, 1977, to be counted by the American Arbitration Association on August 23, 1977. (The ballots were counted on that date and at the time of oral argument we will ask the Court's permission to submit the count certified by the AAA.)

SCAVO appeals from all of Judge Pierce's Order below.

Statement of Facts

In the past decade, the Offshore Division jobs have been halved in a declining American Merchant Marine.

During the past year, a Petition was circulated among the Offshore Division membership to radically reduce the number of Offshore Division officials, and to reclassify downward certain offices so as to reduce, by almost half, the total cost of these officials' salaries. The Petition also provided for a substantial reduction in dues if the proposed reductions and reclassifications of offices were approved by the Offshore Division membership. It provided further that for a period of five years, the Offshore Division Executive Council, the Offshore Division's governing body, could not increase the number of Offshore Division officials and could not reclassify upward any official positions unless they first obtained the approval of the Offshore Division membership.

Under the Offshore Division By-Laws, once 15% of the Offshore Division membership, in good standing, sign the Petition, then the machinery for a secret mail ballot referendum to amend the By-Laws is put into motion.

By the end of November, 1976, it became apparent that enough members were signing the circulated petitions so that the required 15% would soon be reached. From the beginning, the defendant SCAVO viewed the Petition with strong disfavor (JA 104). He repeatedly raised objections to the Petition with SCHWARTZ, the Union's counsel. To SCAVO's extreme displeasure, SCHWARTZ advised that the Petition was in accordance with the amending provision of the Offshore Division By-Laws and, subject to verification of the "good standing" of the members signing the Petition, and possibly a spot signature check, the Petition would have to be submitted, *by itself*, to the Offshore Division membership for a "yes" or "no" vote.

On January 12, 1977, the Petition was formally presented to SCAVO for submission to the Offshore Division membership. SCAVO then did two things:

First, acting strictly on his own, he attempted to fire SCHWARTZ. Again, strictly on his own, he hired his own lawyer, COHEN, and put him on the Union payroll as the Offshore Division attorney.

Second, he announced that he had the authority under Article VI, Section 1(i) of the International Constitution to:

(a) initiate, on his own, a proposed amendment to the Offshore Division By-Laws, and

(b) to place it on the same ballot with the Petition and require an "either/or" or "neither" vote.

SCHWARTZ advised SCAVO that the provision of the International Constitution upon which he relied did not give him any such authority; that no prior International President had ever claimed that authority or ever attempted any such action; and that the intent of the provision was solely to permit polling of the membership, and that, in fact, it had been so used in the past. Nevertheless, SCAVO and COHEN persisted and refused to send out the membership Petition—Proposition No. 1—without also placing on the same ballot, his own Proposition No. 2.

SCAVO's proposal was a flat 2% reduction in the Offshore Division membership dues. It did not reduce the number of Offshore Division officials. It did not provide for overall economies in the total cost of the Offshore Division salaries. It simply offered double the reduction in the Offshore Division membership dues proposed in the Petition.[9]

Aside from the obvious "politics" of offering a 2% flat reduction in dues during the IOMM&P's election year,[10] and the obvious attempt to weaken Proposition No. 1, by sending out the two Propositions together with instructions to vote for one or neither, SCAVO's maneuver immediately created the strong possibility of a plurality vote rather than the majority vote which is required to amend the Offshore Division By-Laws.[11]

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[9] As part of the Offshore Division membership dues, a member must pay 6% of his Vacation money. The Petition proposed, after certain conditions were met, a reduction to 5%. Scavo proposed a reduction with no conditions.

[10] The Union's regular triennial elections will be held this year. (JA 155).

[11] The By-Laws may be amended by a secret majority referendum vote.

Unless propositions are submitted individually for a "yes" or "no" vote, it is difficult, if not practicably impossible, to obtain a *majority* vote. What happens instead, is the achievement of a *plurality* vote.

[Footnote continued on following page]

Both Proposition No. 1 and Proposition No. 2 were taken to the American Arbitration Association by SCAVO personally, without advising the other two International officials. The International Executive Vice President, Gerald L. Johnson, was one of the initiators of the Petition. When he discovered that SCAVO was submitting Proposition No. 2, he and several other Offshore Division members who signed the Petition, retained TABAK, who moved by Order to Show Cause to restrain such action. The Temporary Restraining Order was denied by Judge Pierce on February 3, 1977, and the preliminary injunction hearing was scheduled for February 10, 1977.

The Court referred to the meeting of the IOMM & P's regular International Convention which was scheduled for the following week *and stated that it had the power* to overrule SCAVO (Memorandum Order, February 3, 197.).

SCAVO, however, instead of waiting for the Convention to meet and rule, decided to send the ballot out anyway.[12] The ballot appears on page 13.

On February 10, 1977, the International Convention was still in session in San Diego, California and the hearing was postponed to February 17, 1977. After hearing substantial oral argument, the Court, on its own motion, adjourned the matter until March 11, 1977.

MAJORITY VOTE (100 VOTES CAST)

Yes	*No*
55	45

PLURALITY VOTE (100 VOTES CAST)

Proposition 1	*Proposition 2*	*Neither*
40	30	30

[12] At the same time, *Scavo* proposed another personally-initiated amendment to the By-Laws in his "Referendum for Fiscal Autonomy." This proposed amendment is the subject of a separate lawsuit brought by the International Vice President and International Secretary-Treasurer (77 Civ. 510 (LWP)). Although the issue involved is identical, Judge Pierce has not yet issued a final order in this case.

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Official Secret Ballot

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, OFFSHORE DIVISION

REFERENDUM BALLOT ON PROPOSED OFFSHORE DIVISION BY-LAWS AMENDMENTS

Please read material on reverse side.

VOTING INSTRUCTIONS

1. Mark the ballot in the box which expresses your choice.
2. Place your ballot inside the small blue envelope which has the words **SECRET BALLOT** on the front, and seal the envelope.
3. Put the sealed blue **SECRET BALLOT** envelope inside the blue return envelope addressed to the American Arbitration Association.
4. **RECORD YOUR NAME, ADDRESS, SOCIAL SECURITY NUMBER AND SIGNATURE** on the front of the blue return envelope addressed to the American Arbitration Association. (This is for control purposes only. The secrecy of your vote will be protected because the **SECRET BALLOT** envelope will be separated from the return envelope before counting.)
5. Mail the blue reply envelope as soon as possible. No postage is necessary if mailed in the United States. **YOUR REPLY ENVELOPE MUST BE RECEIVED NO LATER THAN 5 PM, THURSDAY, APRIL 28, 1977.**

TURN PAGE

PROPOSITION NO. 1

These amendments to the By-Laws of the Offshore Division were proposed by a petition signed by at least 15% of the Division's members in good standing in compliance with Article XVIII, Section 1 of the By-Laws of the Offshore Division.

Article III, Sections 1(b), 1(c) and 1(d) shall be deleted in their entirety and the following language substituted:

Article III, Section 1(b): Offshore Ports shall be classified on the basis of service to the membership. Port classifications approved by this referendum vote shall not be changed for a minimum period of five years following the adoption of this amendment unless such change is submitted to a referendum vote of the membership. Port agents shall be elected in the following ports:

New York, New Orleans, Houston, Wilmington, Calif., San Francisco, Seattle.

Executive Assistant Port Agents shall be elected in the following Ports:

New York New Orleans San Francisco

Assistant Port Agents shall be elected in the following ports:

New York (3) New Orleans (2) Houston (1) Baltimore (1)
Galveston (1) San Francisco (2)

Field Representatives may be appointed in the following ports:

Philadelphia	Port Arthur	Jacksonville, FL
Norfolk	Honolulu	Charleston, S.C.
Mobile	Portland, Ore.	San Juan, Puerto Rico
Tampa	Boston	Hollywood, FL

Article III, Section 1(c): The three elected Vice Presidents shall not be in addition to the elected Port Agents. The Vice President (Atlantic) shall be the Port Agent of the Port of New York; the Vice President (Pacific) shall be the Port Agent of the Port of San Francisco; the Vice President (Gulf) shall be the Port Agent of the Port of New Orleans.

Article III, Section 1(d): As economic necessity or as service to the membership may require, the Offshore Division Executive Council shall, by its majority vote, have the authority to close, reclassify or merge ports and to designate all Field Representatives subject to the limitation of Section 1(b) above.

Article IX, Section 1, shall be amended wherever and in such respects as are necessary to provide the following:

1. Only duly elected Port Agents shall be members of the Offshore Division Executive Council in addition to the first six enumerated officers named in this Section 1.

Article XI, "Income and Assets" shall be amended to substitute five (5%) percent in lieu of six (6%) percent of the gross amount of each vacation benefit received for work performed on any MM&P contracted vessel, and to substitute five (5%) percent in lieu of six (6%) percent of each vacation benefit received by every MM&P Offshore Division Official.

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PROPOSITION NO. 2

This Referendum vote was authorized by the President of the International Organization of Masters, Mates & Pilots under the authority granted to him in Article VI, Section 1, paragraph (i) of the Constitution of the International Organization to direct a Referendum vote by the membership of any subordinate body on any proposition when he believes that the welfare of the membership of that subordinate body will be protected or enhanced by approval of such proposition.

WHEREAS, the President of the International Organization of Masters, Mates and Pilots made a thorough study of the financial condition of the Offshore Division, and

WHEREAS, it is feasible at this time to reduce membership dues.

NOW, THEREFORE, BE IT RESOLVED that Article XI of the Offshore Division By-Laws, "Income and Assets" shall be amended to substitute four (4%) percent in lieu of the six (6%) percent of the gross amount of each vacation benefit received for work performed on any MM&P-contracted vessel and to substitute four (4%) percent in lieu of six (6%) percent of each vacation benefit of every MM&P Offshore Division Official; and

BE IT FURTHER RESOLVED that this reduction of membership dues will be attained by effecting a practical reduction of operating costs of the Offshore Division without curtailing service to the membership.

This amendment shall be effective upon its adoption and shall apply to any vacation benefits earned subsequent to its adoption.

Vote for one only

Proposition No. 1 ☐

Proposition No. 2 ☐

Neither Proposition ☐

The San Diego Convention completed its business prior to the hearing on February 17, 1977, and the various relevant resolutions passed by the Convention were available to all parties substantially in advance of the March 11, 1977 hearing.

The regularly scheduled 63rd International Convention, meeting in San Diego from February 8 to February 14, 1977, affirmed that SCAVO had no authority to initiate, on his own, a referendum to amend the Offshore Division By-Laws, declared that Article XVIII of the By-Laws set forth the exclusive method whereby proposed amendments may be submitted, and declared illegal and void SCAVO's own referenda. The resolution appeared on the agenda as Item # 57 entitled, "Affirmation, International President does not have the authority to initiate referenda to amend International Constitution or Offshore Division By-Laws and declaring illegal and void such referenda", and the text of the resolution as it appeared on the agenda is on the next page.

In addition, the Convention ruled that the original proposed amendment, initiated by a Petition signed by 15% of the Offshore Division's members in good standing, as required by Article XVIII of the By-Laws, was proper and should be sent out *alone* for a "yes" or "no' vote by the Offshore Division membership. This Resolution appeared as Agenda Item No. 85, "Offshore Petition for Reclassification of Ports", and the text of such Resolution on the agenda is on the next page.[13]

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[13] Despite the clear import of these two Resolutions, SCAVO proceeded to make preparations to send out yet another amendment to the By-Laws entitled, "Reclassification of Ports." Once again, the International Vice President and International Secretary-Treasurer, by Order to Show Cause, sought to restrain SCAVO's illegal assertion of authority (77 Civ. 844 (LWP)). A Temporary Restraining Order was signed by Judge Pierce. Since the issues involved are almost identical to the issues here, a Motion for Partial Summary Judgment has been made. It is still pending before Judge Pierce. That case also includes the two additional related issues referred to at p. 6, footnote 4, *supra*.

63rd Convention
San Diego, California
Kona Inn
February 8, 1977

15

Agenda Item 57

SUBJECT Affirmation International President does not have authority to initiate referenda to amend International Constitution or Offshore Division By-Laws and declaring Illegal and Void such Referenda

If Constitutional Amendment:

Article _____ Section _____ Page _____

Submitted by Allen Scott

COMMITTEE Resolutions and Petitions

RESOLUTION

BE IT RESOLVED:

1. Neither Article VI, Section 1(i) nor any other provisions of the International Constitution or the Offshore Division By-Laws grants the International President the authority to initiate, on his own, a referendum to the Offshore Division membership which purports to or would amend the Offshore Division By-Laws, the two exclusive ways by which any proposed amendments to the Offshore Division By-Laws, Article XVIII, Section 1. may be promulgated being set forth in the Offshore Division By-Laws

2. That neither Article VI, Section 1(i) nor any other provisions of the International Constitution grants the International President the authority to initiate, on his own, a referendum to the membership of the I O M M & P which purports to or would amend the International Constitution, the exclusive way by which any such proposed amendments may be promulgated for submission to the membership for referendum vote being contained in Article X Section 1(a) of the Constitution.

3. That the action of the International President in promulagating and seeking and causing to be sent out to the Offshore Division membership a referendum ballot entitled "Proposed Offshore Division By-Laws Amendments for Fiscal Autonomy" was and is in violation of the International Constitution and the Offshore Division By-Laws, and consequently was and is illegal and a nullity and all activities with respect thereto shall forthwith cease and terminate and notification thereof shall forthwith be given to the membership of the Offshore Division, the American Aribtration Association and all other parties and persons having any interest therein or connection therewith, includingthe Honorable Lawrence W. Pierce, U. S. District Judge for the Southern District of New York.

4. That the action of the International President in promulgating and seeking and causing to be sent out to the Offshore Division Membership a referendum ballot by which the Offshore Division membership was given a choice to vote on a proposition stated to be promulgated by him pursuant to the International Constitution, Article VI, Section 1(i), relating in part to a reduction in Offshore Division Membership dues, which proposition was sent out as an alternative to a proposition promulgated by membership petition, was and is in violation of the International Constitution and the Offshore Division By-Laws, and consequently was and is illegal, void and nullity and all activities with respect thereto shall forthwith cease and terminate and notification thereof shall forthwith be given to the membership of the Offshore Division ~~Division,~~ the American Arbitration Association and all other parties and persons having any interest therein or connection therewith, including the Honorable Lawrence W. Pierce, U. S. District Judge for the Southern District of New York.

63rd Convention
San Diego, California
Kona Inn
February 8, 1977

15

genda Item 85

BJECT Offshore Petition for Reclassification of Ports

Constitutional Amendment:

Article_____ Section_____ Page_____

bmitted by R.J. Soriano

MMITTEE Resolution and Petition Concurred

RESOLUTION

IT RESOLVED THAT,

e proposition for amending the By-Laws of the Offshore Division submitted Offshore Division membership petition, which deals with reclassification of rts and a reduction of Offshore Division membership dues, which was properly pposed by a petition signed by members of the Offshore Division in good standing, accordance with Article XVIII, Section 1 of the Offshore Division By-Laws, forthwith sent out separately to the Offshore Division membership in a referdum ballot to be voted for on a "yes" or "no" basis.

At the March 11, 1977 hearing there were no disputed questions of fact. It was stipulated that Agenda Items #57 and #85 were, in fact, the resolutions that were duly passed at the Convention; that the Convention was duly convened; and that the delegates all had the correct credentials.

At the March 11, 1977 hearing SCAVO argued that these resolutions were invalid because he alone had the sole and final authority to interpret the International Constitution.

In substance, the position which SCAVO took, through his counsel, at the March 11, 1977 hearing can be phrased as follows:

> "I have the unrestricted authority to interpret the International Constitution and the Offshore Division By-Laws. Any resolution, whether passed by the International Convention, the General Executive Board or the Offshore Division Executive Council, is illegal if it contravenes or rejects my interpretation of the Constitution or Offshore Division By-Laws. My interpretations of the provisions of the Constitution and the Offshore Division By-Laws are of such force and effect and finality that any contrary resolution, by any governing body, is an attempt to amend the particular provisions of the Constitution and Offshore Division By-Laws, and therefore is outside of the authority of any governing body passing such a resolution. Thus, any attempt to review or change decisions made by me under my interpretations, whether by the Offshore Division Executive Council, the General Executive Board, or the International Convention, is illegal." [14]

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[14] The awesome range and scope of SCAVO's position is best understood when we understand that his claim of unrestricted authority not only includes his right to send out referenda, but

[Footnote continued on following page]

The Trial and Opinion Below

SCAVO erroneously contends that the Court below failed to make an independent inquiry and examination of the issues in this case; that Judge Pierce merely rubber-stamped the actions of the Convention. The Opinion and Transcript make it clear, however, that this is just not the case. As will be shown below, the District Court's Opinion was based on a thorough examination of all relevant By-Law and Constitution provisions with full argument and evidence presented by all parties.

On March 11, 1977, a hearing was convened and pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court, on its own motion, and with the approval of all parties, consolidated the hearing with the trial of the case on the merits. All parties were present at the trial and extensive argument was heard. All issues were fully briefed and extensive affidavits were submitted.

There were no disputed questions of fact. For example, it was stipulated that the Convention was duly convened; that the delegates had all the correct credentials; and that the Resolutions in issue were duly passed at the Convention.

At the trial, the Court carefully considered Plaintiffs-Appellees' claim that Article VI, § 1(i) of the International Constitution did not give SCAVO the power to personally initiate referenda to amend the Offshore Division By-Laws and found that claim to be valid:

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also includes his unrestricted authority with regard to attorneys and administrative assistants. These latter two issues were before Judge Pierce at the March 11, 1977 hearing. (JA 159; Brief on Behalf of IOMM&P and its Subordinate Body, the Offshore Division, pp. 31-40; Affidavit of Marvin Schwartz dated February 17, 1977, pp. 1-7).

THE COURT: What does (i) mean?

MR. TABAK: (i) means that if there is a labor negotiation he [the International President] may send out a referendum to determine what has to be done with regard to whether we are going to picket, we are going to ask for more money or not, but it certainly does not say anything about sending out a referendum to the membership to amend the Constitution or to amend the By-Laws. (JA 97) (Also see: JA 77; 81-82; 91-97)

The Court also discussed with both counsel the specific procedures provided for amending the By-Laws in Article XVIII, and SCAVO's contention that Article VI, § 1(i) provided an "alternative" procedure for amending the By-Laws. The Court discussed the fact that there is no guarantee provided in Article VI, § 1(i), as there is in Article XVIII, that a proposed amendment by SCAVO is supported by a substantial percentage of the Offshore Division members or their democratic representatives. (JA 139)

The scope and import of Article IV of the Constitution was also examined by the court:

THE COURT: How do you [Mr. Cohen] interpret this paragraph in Article IV that the Convention is "the source of all true and legitimate authority over the Organization and possesses as such supreme and absolute power over same", et cetera, but at the bottom, it states, "the Convention does not have the power to alter or amend the Consitution except as provided," et cetera. What do you suppose those words mean, that the Convention is "the source of all true and legitimate authority and possesses as such supreme and absolute power over same?".

> MR. COHEN: It means that the Convention can do anything that is not otherwise provided in the Constitution. The Convention has the right to do anything except to amend the Constitution or the By-Laws. (JA 106)

The Court also heard argument as to whether the interpretations rendered by the Constitution were invalid attempts to amend the Constitution or By-Laws. Both counsel presented extensive argument on the matter. (JA 85-93). Counsel for SCAVO argued:

> ". . . it is our position that the Convention has no authority to pass such a resolution because it would have the effect of amending the Constitution." (JA 92)

In response, counsel for Appellee argued:

> "What is happening is that Scavo was relying on a provision (Art. VI, § 1) which he says means something and the Convention says it doesn't mean what you mean.
>
> The Convention is not changing a provision.
>
> The Convention is ruling with regard to the interpretation of a provision." (JA 93).

After hearing all the evidence, the Court concluded that the Resolutions upholding the Plaintiffs-Appellees' position were not invalid amendments to the Constitution and any such holding would be "contrary to the weight of the evidence." (JA 161).

Counsel for SCAVO also argued that only the President had final, unreviewable authority to interpret. "[O]n an interpretation of the Constitution, if the President is wrong, the only resort is to the courts." (JA 113).

The Court, therefore, closely scrutinized SCAVO's claim that Article VI gave him sole and unreviewable authority to interpret the Constitution, in conjunction with the power of the International Convention as the Organization's highest governing body. The Court said this:

> ". . . they [the Convention delegates] have the power to do every and anything except amend the Constitution. It [the Constitution] says that. . . . Mr. Tabak and Mr. Schwartz say what they can do is interpret what the Constitution says and that is different from amending the Constitution. They say they [the Convention delegates] were not amending it. They were not amending the By-Laws or the Constitution. They were doing that which is within their capacity, to wit: Interpreting it. Again, you [Mr. Cohen] have fallen back on [Art. VI, § 1(d)] saying that (d) in Article VI says the President has the power to decide all points of law, but then, in turn, we get back to the authority of the Convention in Article IV which says that they [the Convention delegates] are supreme except they can't amend the Constitution." (JA 107, lines 21-25; 108, line 207).

The Court, in summing up counsel for SCAVO's argument on SCAVO's purported unlimited power, said:

> ". . . you refer me to [Art.] VI, 1(d) and say in any event, the President is given the power to decide all points of law, interpretations of the Constitution, et cetera. In effect, placing into the hands of the President the power, first decision making authority, unlimited decision making authority and then, saying and in the event there is some question about it legally, the President will review the decision which he made and will de-

> cide whether he was right or wrong. Isn't that in rhetorical form? I ask you [Cohen] if you agree with it . . ." (JA 133-134).

Argument was also heard concerning SCAVO's alleged sole authority to interpret the Constitution in terms of democratic principles underlying federal labor policy in general and the IOMM&P in particular. (JA 114-116). The court addressed itself to "the whole question of avoiding tyranny in the structure of union leadership." (JA 115).

At the conclusion of the trial, the decision was reserved. Thereafter, on March 14, 1977, the Court below issued its Opinion which basically found:

(1) that "the International Convention 'is the source of all true and legitimate authority over the Organization and possesses as such supreme and and absolute authority over same and all channels leading thereto . . .'", and accordingly, the International Convention had the authority to interpret the International Constitution;

(2) that the Resolutions passed by the International Convention were not invalid attempts to amend the Constitution and that the interpretations rendered by the International Convention were fair and reasonable;

As the Court wrote:

> "The interpretations rendered by the International Convention through the passage of the resolutions cited in the court's findings of fact were fair and reasonable. To conclude that these resolutions were invalid attempts to amend the International Constitution would be contrary to the weight of the evidence presented."

(3) that SCAVO's contention that only the President may interpret the Constitution was contrary to the provisions of the International Constitution and also would be an unfair and unreasonable interpretation.

As the Court wrote:

> "Furthermore, to accept defendant's contention that only the president may interpret the constitution would be unfair and unreasonable for such an interpretation of the constitution would place in the president the sole and unreviewable authority to pass upon the propriety or constitutionality of his own actions. Indeed, such an interpretation would be inconsistent with the democratic principles said to underlie the governance of the IOMM&P as well as the objectives of L.M.R.D.A. See 29 U.S.C. § 401(a)."

On April 8, 1977, the Court issued its Order. The Order:

(1) enjoined SCAVO from submitting any referendum not in compliance with the procedures provided in the Constitution, By-Laws or Resolutions of the International Convention, to wit: that SCAVO could not initiate on his own, a referendum which would amend the By-Laws of the Constitution; and

(2) directed SCAVO to comply with the Resolutions passed by the International Convention, to wit: that Proposition #1, the 15% membership petition, ". . . which was properly proposed by a petition signed by members of the Offshore Division in good standing, . . . be forthwith sent out separately to the Offshore Division membership in a referendum ballot to be voted for on a 'yes' or 'no' basis."

Thus, it is clear that the Court below did not simply "rubber stamp" the Convention's resolutions. Rather, the Court carefully analyzed each issue and based its decision on the relevant provisions of the International Constitution and Offshore Division By-Laws and the evidence presented at the trial below.

Applicable Provisions of the International Constitution and Offshore Division By-Laws

It is agreed by all parties that this case involves an analysis of the Constitution and Offshore Division By-Laws. The applicable provisions cited in SCAVO's brief, however, have been edited, omitting certain relevant portions of the provisions. In fact, there are extremely important and relevant sections SCAVO has omitted entirely. For the convenience of the Court, we will set forth these provisions in full, italicizing the portions omitted in SCAVO's brief.

ARTICLE IV

Section 1. Authority and Power of Conventions

The authority and power of this Organization is vested in the members thereof acting by and through their duly elected delegates meeting in Convention assembled.

Such Convention is the source of all true and legitimate authority over the Organization and possesses as such supreme and absolute power over same and all channels leading thereto. It shall, while in session, have the sole and exclusive power to grant charters to subordinate bodies; to suspend or revoke for cause any charter so granted; to hear and determine all appeals and to enact laws and establish regulations to settle grievances from the subordinate bodies or mem-

bers thereof in order to carry out in the most effective manner the objectives and purposes of this Organization. The Convention does not have the power to alter or amend the Constitution except as provided in Article X hereof.

ARTICLE VI, § 1(d)

It shall be the duty of the International President and he is hereby authorized to:

d) decide on all points of law, interpretations of the Constitution, and/or grievances submitted to him by the subordinate bodies, after consulting with International Counsel. *When the International President makes a decision or interpretation and/or orders a subordinate body to observe the laws, rules and regulations and the subordinate body refuses, the subordinate body shall be subject to suspension or revocation of its charter with the approval of the General Executive Board.*

ARTICLE VI, § 1(i)

It shall be the duty of the International President and he is hereby authorized to:

i) direct that a referendum vote *or a vote by membership meeting* be held by the membership of any subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action.

ARTICLE VII

Section 3 sets forth the Duties and Authority of the General Executive Board:

Section 3. Duties and Authority.

The General Executive Board shall act upon and decide on all appeals presented to it by subordinate bodies or individual members. Second only to the Convention in legislative and policy-making authority it shall act between Conventions on all matters related to the welfare of the Organization not specifically prohibited by this Constitution or restricted to action by membership in referendum ballot and shall decide on all questions of law.

Although SCAVO's brief provides for the citing of all "applicable Provisions of International Constitution and Offshore Division By-Laws", SCAVO makes no mention of the relevant By-Law provisions. Article XVIII of the Offshore Division By-Laws sets forth the exclusive methods for their amendment.

ARTICLE XVIII

AMENDMENTS TO BY-LAWS

Section 1

These By-Laws may be amended by a secret majority referendum vote of the Division's membership.

Proposed amendments may be submitted to such membership vote by either a majority vote of the Offshore Division Executive Council or by a petition signed by fifteen percent (15%) of the Division's members in good standing.

Section 2

An impartial balloting agency shall conduct all referenda required by this Article.

Issue Presented

The issue presented in this case is whether the 63rd International Convention's ruling, that Article VI, § 1(i) of the MM&P Constitution does not empower SCAVO to initiate, on his own, referenda to amend the By-Laws of the Offshore Division, is a fair and reasonable interpretation of the Constitution. The Court below correctly answered this question in the affirmative and its decision should be upheld.

In order to resolve this question, the Court below was required to decide two sub-issues. The first sub-issue is whether the International Convention, as the Union's highest tribunal, has the final power to interpret the Constitution. The Court below correctly answered this question in the affirmative, rejecting as unfair, unreasonable and contrary to the weight of the evidence presented, SCAVO's claim that the MM&P Constitution gives him the sole and unreviewable power to interpret the Constitution.

The second sub-issue is whether, in light of all the evidence and arguments presented, the International Convention's reading of the Constitution was, in fact, a permissible, reasonable interpretation of the Constitution. The Court below correctly answered this question in the affirmative, after thoroughly considering the MM&P Constitution, the Offshore Division By-Laws, the text of the Convention's Resolution, and the evidence and arguments presented as to the meaning of the relevant Constitution and By-Laws provisions.

Summary of Argument

Article VI, § 1(i) of the Constitution does not give SCAVO the authority to initiate, on his own, referenda to amend the Offshore Division By-Laws. The Offshore

Division By-Laws may be amended only in accordance with the specific procedures set forth in Article XVIII, § 1 of the By-Laws. The Court below found that this was a fair and reasonable reading of the Constitution and By-Laws provisions, based upon the evidence and arguments presented and in light of proper principles of construction.

SCAVO unsuccessfully contends that Resolution No. 57 of the International Convention, which confirmed the above reading of Article VI, § 1(i), constituted an invalid "amendment", rather than a permissible interpretation, of Article VI, § 1(i).

The court below, however, reviewed the Resolution together with the Constitution and By-Laws, and correctly concluded that the International Convention's Resolution No. 57 was a fair and reasonable interpretation of Article VI, § 1(i) supported by the weight of the evidence.

SCAVO's only means of avoiding the Convention's fair and reasonable interpretation of the Constitution is to assert the improbable argument that the International Convention has no power to interpret the Constitution and that Article VI, § 1(d) gives SCAVO the sole and unreviewable authority to interpret the Constitution.

The court below, however, specifically rejected this argument as unfair, unreasonable and "inconsistent with the democratic principles said to underlie the governance of the IOMM&P as well as the objectives of L.M.R.D.A." On the contrary, the court below found that the International Convention, the union's highest tribunal and highest governing body, "is the source of all true and legitimate authority over the Organization and possesses as such supreme and absolute power over

same and all channels leading thereto." The conclusions of the Court below are correct and should be upheld.

ARGUMENT

POINT I

The Courts Will Not Disturb The Interpretations Of The Union Constitution Rendered By The Union's Highest Tribunal So Long As They Are Fair, Reasonable, And Violate No Law.

Although we will demonstrate in Point II below that the *correct* interpretation of Article VI, § 1(i) does not encompass referenda to amend the Offshore Division By-Laws, it must be emphasized at the outset that the Plaintiffs-Appellees' burden is, in fact, a lesser one. As the Court below correctly stated in its opinion, and as the Appellant concedes, the courts should not substitute their judgment for that of the Union but should respect the rulings of the Union's highest tribunal so long as they are fair, reasonable and violate no provision of law. *Gurton* v. *Arons*, 339 F.2d 371, 375 (2nd Cir. 1964); *Gardner* v. *Woodcock*, 384 F. Supp. 239 (E.D. Mich. 1974); *Vestal* v. *Hoffa*, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). Judge Pierce properly adhered to the resolution adopted by the International Convention once he determined for himself that the resolution constituted a fair and reasonable interpretation of the Constitution by the Union's highest tribunal.[15] This decision would be correct even if Judge

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[15] The Appellant repeatedly asserts that the International Convention is a "legislative body" (Appellant's Brief, p. 12, 13, 31), thereby implying the Convention is *only* a legislative body;

[Footnote continued on following page]

Pierce did not in fact agree, as he did in this case, with the interpretation rendered by the Convention.

Under the line of cases cited above, the Court's factual inquiry should be whether the interpretation in question was rendered by a body having the authority to do so; whether the interpretation was rendered in a procedurally correct and duly authorized manner; and whether, in light of all the relevant documents and evidence, the interpretation is a lawful, fair and reasonable interpretation. *Vestal* v. *Teamsters*, 245 F. Supp. 623 (M.D. Tenn. 1965).[16]

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the authority cited for this proposition is Article VII, § 3 of the Convention, which sets forth the powers of the General Executive Board stating that the Board is "second only to the Convention in legislative and policy-making authority." There is no doubt that the Convention is the Union's highest legisaltive body. As Judge Pierce correctly recognized, however, the Convention is also the Union's highest *tribunal* and as such exercises both legislative and judicial powers. If Appellant had examined Article IV, § 1 of the Constitution, "Authority and Power of Conventions", instead of simply relying on isolated language from another provision, he would have seen that, among other powers, the Convention "shall, while in session, have the sole and exclusive power . . . to hear and determine all appeals. . . ."

[16] *Vestal* v. *Teamsters*, *supra*, is discussed at some length by the Appellant in his Brief. We have no quarrel with his citing *Vestal* as authority for the proposition that the court should not substitute its judgment for that of the Union and should not overturn a fair and reasonable interpretation of the Union Constitution rendered by the Union's tribunal. The Appellant, however, seems to suggest that the *Vestal* v. *Teamsters* court also determined that the Teamsters' President had ultimate authority to interpret the Constitution. This is erroneous. Even the power of the Teamsters' President was subject to review by the General Executive Board and the Convention. Similarly, as we will demonstrate below, SCAVO's exercise of his claimed power is subject to review by the General Executive Board and the Convention.

POINT II

Article VI § 1(i) Of The International Constitution Does Not Give SCAVO The Authority To Bypass The Specific Amending Procedures Set Forth In Article XVIII Of The Offshore Division By-Laws And To Initiate, On His Own, Referenda Which Would Amend The By-Laws.

SCAVO erroneously contends that there is only one possible reading of Article VI, § 1(i) of the International Constitution, a reading which would authorize him to initiate his own referenda to amend the By-Laws of the Offshore Division without complying with the specific, exclusive amending procedures set forth in the Offshore Division By-Laws. Therefore, SCAVO argues, the differing interpretation confirmed by the International Convention is "inherently unreasonable" and constitutes an "amendment" to this Constitutional provision. Moreover, SCAVO argues that any reading of Article VI, § 1(i) which does not encompass referenda to amend the Offshore Division By-Laws would, in effect, "abolish the office of the President" and infringe upon the democratic rights of the union membership.

We will demonstrate below, however, that the Convention did not "amend" but rather interpreted Article VI, § 1(i); that the correct and reasonable reading of this provision does not authorize SCAVO to initiate his own referenda to amend the Offshore Division By-Laws; and that SCAVO's theory, rather than the Convention's interpretation, poses the real threat to the democratic processes of the Union.

A. The International Convention Did Not "Amend", But Rather, Interpreted, Article VI, §1(i) of the Constitution.

Article VI, §1(i) of the International Constitution provides:

> It shall be the duty of the International President and he is hereby authorized to:
>
> "direct that a referendum vote or a vote by membership meeting be held by the membership of any subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action."

The construction of Article VI, § 1(i) adopted by the International Convention in its Resolution No. 57, is that this provision plainly does not encompass referenda to amend the Offshore Division By-Laws. Thus, the Convention confirmed the position of the Plaintiffs-Appellees, that Article VI, § 1(i) is not an "alternative" method of proposing amendments to the Offshore Division By-Laws, the exclusive amendment procedures being set forth in Article XVIII of the By-Laws. Judge Pierce found that the Convention's reading of Article VI, § 1(i) was an interpretation of the Constitution.

In claiming that the Convention improperly "amended" Article VI, § 1(i) when it overwhelmingly adopted Resolution No. 57, SCAVO must argue, in effect, that this Constitutional provision, on its face, can *only* be read as including amendments to the Offshore Division By-Laws. SCAVO argues that any other reading would be "inherently unreasonable and unconstitutional" (Appellant's Brief, p. 10), thus an invalid "amendment" to the Constitution rather than a permissible interpretation of a Constitutional provision. In

fact, the more likely reading of Article VI, § 1(i) is that this provision on its face does not encompass referenda to amend the Offshore Division By-Laws.

Furthermore, the problem with SCAVO's argument, as the Court below recognized, is that we are construing a Constitution, not words in a vacuum, and that a Constitutional provision cannot be read in the simplistic fashion SCAVO proposes.[17] SCAVO's arbitrary reading ignores the fact that the Offshore Division By-Laws contain exclusive, specific provisions for the amendment of the By-Laws, and that Article VI, § 1(i)—on its face and especially in light of other provisions of the Constitution—clearly does not pertain to amendments of the Offshore Division By-Laws, as will be demonstrated below.

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[17] As Judge Pierce stated, responding to the Appellants overly literal, unreasonable stance:

> THE COURT: Yes, but the reason we have the United States Supreme Court interpreting what the United States Constitution means rather than just reading what it says, which all of us can do, is because it doesn't always quite mean what everybody thinks it means. At least you get opposing views as to what simple language seems to say and seems to mean. Isn't that really the case here?
>
> MR. COHEN: Absolutely, Your Honor (JA 144).

Thus, the Court below found that the International Convention was interpreting the Constitution and specifically stated in its Opinion (JA 161):

> "To conclude that these resolutions were invalid attempts to amend the International Constitution would be contrary to the weight of the evidence presented."

B. The Fair and Reasonable Reading of Article VI, § 1, Confirmed by the Convention, is that this Provision Does Not Give SCAVO the Authority to Initiate, On His Own, Referenda to Amend the Offshore Division By-Laws.

1. Article VI, § 1(i) of the Constitution on its face plainly does not encompass referenda to amend the By-Laws of the Offshore Division.

The basis SCAVO cites for his alleged authority to conduct his own amendment referenda is Article VI, § 1(i) of the Constitution, which provides:

> "It shall be the duty of the International President and he is hereby authorized to:
>
> i) direct that a referendum vote or a vote by membership meeting be held by the membership of any subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action."

This provision, on its face, cannot apply to referenda to amend the By-Laws of the Offshore Division.[18] First of all, the By-Laws can only be amended by a "*secret majority referendum* vote of the Division's membership" (Article XVIII, § 1) [emphasis added], whereas the Constitutional provision cited above envisages merely "a referendum vote *or a vote by membership meeting* . . ."

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[18] It should be emphasized that SCAVO's assertion of authority to conduct amendment referenda is not limited to the Offshore Division. Article VI, Section 1(i) refers to "any subordinate body"; thus, SCAVO could attempt the same actions in the Pilots' Division, the East Coast Inland Region, the West Coast Inland Region, and the Locals in the Panama Canal, all despite their specific amendment procedures.

[emphasis added]. The Appellant conveniently omits the language pertaining to "a vote by membership meeting" and thus ignores the implications of Article VI, § 1(i) read in its entirety.

Secondly, Article VI, § 1(i) plainly requires neither a secret vote, nor a majority vote; in addition, no reference is made therein to any impartial balloting agency, as is required by the Offshore Division By-Laws. This provision is thus inapposite, and wholly inappropriate for the amendment of the By-Laws, especially when compared with the specific procedures set forth in the By-Laws provision intended for the amendment of the By-Laws.

The Constitutional provision cited above is clearly intended to apply only to matters not specifically covered in some other Constitutional or By-Laws provision, and only to matters of such nature as not to require the strict formalities of a secret majority mail ballot referendum conducted by an impartial balloting agency. Such matters, for example, might include taking a poll among the members of a subordinate body on the advisability of affiliating with another labor organization, or getting a sense of the members' feelings on contract issues to aid in collective bargaining negotiations. Just such a poll was conducted in 1973 among Offshore Division members to determine whether there was substantial support for re-negotiation of the "30-day rule" in the contract. (JA 98).

The provision also plainly envisages the possibility of holding an informal vote among only a limited portion of the membership, for it speaks of a vote by "membership meeting". Such a vote is justified for informational purposes and to keep the leadership in touch with the needs of members; if a larger sample is necessary, the President can always supplement this vote by a referendum, under this provision.

Finally, the provision speaks of a vote for the "welfare" of the subordinate body. The "good and welfare" is a traditional term, almost a term of art, in labor union usage, and is something quite different from the amendment of By-Laws. Thus, the matters, issues and propositions encompassed by Article VI, § 1(i) are only those related to the "good and welfare".

In summary, the whole of this provision is directed toward matters which are appropriate for an informal vote, for a vote by less than the whole of the membership and where the feelings of even a substantial percentage, less than a majority, of those polled are significant and helpful. Such a provision does not encompass, and is inappropriate for, the formal amendment of By-Laws.[19]

2. The Offshore Division By-Laws provide specific, exclusive procedures for the amendment of the By-Laws which must be followed in order for an Amendment to be valid.

The method of amending the Offshore Division By-Laws is set forth in Article XVIII of the By-Laws, which provides:

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[19] Further support for a limiting construction of Article VI, Section 1(i) may be drawn from the express authorization, elsewhere in the Constitution, for the Preident to conduct certain votes. For example, Article XI, Section 3(a) allows the President to "direct a subordinate body to take a vote to accept or reject a proposed contract, either by referendum ballot or such procedure as is outlined in the subordinate body's By-Laws." If Article VI, Section 1(i) really gave the President as broad an authorization to conduct referenda as SCAVO claims it does, there would be no need for such an express grant of authority elsewhere, and Article XI, Section 3(a) would be completely superfluous. No construction of Article VI, Section 1(i) should be followed which renders another provision meaningless. Clearly, Article VI, Section 1(i) does not encompass matters specifically provided for elsewhere.

ARTICLE XVIII
AMENDMENTS TO BY-LAWS

Section 1

These By-Laws may be amended by a secret majority referendum vote of the Division's membership.

Proposed amendments may be submitted to such membership vote by either a majority vote of the Offshore Division Executive Council or by a petition signed by 15% of the Division's members in good standing.

Section 2

An impartial balloting agency shall conduct all referenda required by this Article.

Article XVIII, § 1 on its face provides the two *exclusive* means of submitting proposed amendments to a referendum vote. The provision is clearly phrased in exclusive terms:

> "by *either* a majority vote of the Offshore Division Executive Council *or* by a petition signed by fifteen percent (15%) of the Division's members in good standing." [emphasis added].

This formulation of two alternatives in terms of "either . . . or" means exactly what it says, and the International Convention correctly ascertained the plain meaning of Article XVIII § 1 of the By-Laws when it stated, "the two exclusive ways by which any proposed amendment to the Offshore Division By-Laws may be promulgated being set forth in the Offshore Article XVIII, Section 1." [20]

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[20] Appellant argues that the use of the word "may" rather than "shall" in Article XVIII, § 1 of the Offshore Division By-

[Footnote continued on following page]

The specific, exclusive procedures set forth in Article XVIII must be followed in order validly to amend the By-Laws of the Offshore Division. The Constitution and By-Laws of an unincorporated association, such as a union, form a contract between the members which sets out their relative rights and duties and which provides the law under which they consent to be governed. *Carey* v. *Papermakers*, 123 Misc. 680, 206 N.Y.S. 73 (1924); *Gordon* v. *Tomei*, 144 Pa. Super. 449, 457, 19 A. 2d 555 (1941). Because of the contractual nature of the By-Laws of an unincorporated association, it is said that they cannot be amended without the unanimous consent of all the members, unless the By-Laws themselves specifically provide for another mode of amendment. Crane, The Law of Unincorporated Associations (1938). Therefore, when the By-Laws do provide for amendment by the membership in a specified manner, that method of amendment must be followed in order for the amendment to be valid. See *Matter of Hillery* v. *Pedic Society*, 189 App. Div. 766, 769 (1st Dept. 1919); *Weinstock* v. *Ladisky*, 197 Misc. 859, 98 N.Y.S. 2d 85 (1950); see also *Powers* v. *MEBA*, 52 Cal. App. 551, 199 P. 353, 1921); *McNichols* v. *International Typographical Union*, 21 F.2d 497 (7th Cir. 1927); *Weber* v. *Marine Cooks and Stewards Association*, 93 Cal. App. 2d 327, 208 P. 2d 1009 (1949).

Furthermore, a By-Law provision for the future amendment of the By-Laws in a specifically prescribed manner, is a provision which is just as binding and en-

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Laws means that Article XVIII, § 1 cannot be the exclusive method for amending the By-Laws. This is completely erroneous. Without a provision for the amendment of By-Laws, they cannot be amended. Article XVIII thus *permits* their amendment. The use of the word "shall" in § 1 would constitute a *mandate* to amend and would therefore be contrary to the intent of the provision.

forceable as are all the other Offshore Division By-Laws. *Weinstock* v. *Ladisky*, 98 N.Y.S. 2d at 93. A member thus has the enforceable *right* to have amendments proposed and voted on in accordance with the specific procedures set forth in the Offshore Division By-Laws. See also *Carey* v. *Papermakers*, 206 N.Y.S. at p. 84, where the Court stated that the Union's election rules and regulations "constitute a contract with each candidate running for office that the election will be conducted in accordance therewith."

3. The Democratic governing of the Union necessitates following the orderly procedures for amending the By-Laws set forth in Article XVIII.

The Offshore Division By-Laws provide only two alternative means of submitting proposed amendments to the membership: either by majority vote of the Offshore Division Executive Council, or by a petition signed by the required 15% of the Offshore Division's members in good standing. For good reasons recognized by the Court below, the By-Laws provide that a proposal which does not receive either the approval of a majority of the Council, or the backing of at least 15% of the membership, cannot be sent out as a proposed amendment for a vote by the membership.

The International Organization of Masters, Mates and Pilots consists of some 8,000 members residing in all parts of the country and overseas. At any particular moment, many of the Offshore Division members are away at sea on extended voyages which might last up to six months. Because of the dispersal and mobility of the membership, orderly procedures for the running of the Organization and orderly procedures for making any changes in the Organization's Constitution and By-Laws, are of paramount importance to the Union and its members.

In line with the above considerations, well-defined and clearly established procedures for the amendment of the International Constitution and the Offshore Division By-Laws are set forth in each respective document. These procedures, and the standard practices thereunder, have always provided for a secret mail ballot referendum, and for some deliberative process to be carried out *before* proposed amendments are submitted to the membership referendum vote.

Thus, the International Constitution provides the following procedures with regard to amendments:

ARTICLE X

AMENDMENT OF CONSTITUTION

Section 1. International Dues Minimums Assessments and Amendments

a) Subsequent to the adoption of this Constitution, any future International dues minimums, or assessments, or any Constitutional amendment shall be adopted in the following manner:

1. a two-thirds majority pro rata vote in a Regular, Special or Constitutional Convention; and

2. approved by a majority vote of the membership voting in a secret referendum ballot.

* * * * *

c) The referendum ballots by the membership under Subsections (a) and (b) of this Section shall be conducted by an impartial balloting agency, elected by the majority vote of the Convention or General Executive Board whichever the case may be. The impartial balloting agency shall be under the general supervision of a duly elected International Ballot Committee, which Committee shall also be elected by either the International Con-

vention or the General Executive Board, whichever the case may be.

To the same end, the Offshore Division By-Laws, as set forth on page 36, *supra*, require that proposed amendments either receive the approval of a majority of the Offshore Division Executive Council, or receive the endorsement of 15% of the Division's members in good standing, before submission to the membership in a secret mail ballot referendum.

In addition, the orderly procedures for promulgating and sending out proposed amendments have always included the selection of a Ballot Committee from within the Organization to review and oversee the administration of the referendum vote. This procedure is specifically set forth in the International Constitution, Article X, Section 1(c); in the case of the Offshore Division, this procedure has always been followed for all referenda.

These requirements for the approval of proposed amendments to the By-Laws are of substantial importance to the membership. They are designed to insure that any proposed amendment will receive consideration as to its advisability, its legality, its internal coherence, its economic effect on the Offshore Division, and its effect on and relation to all the provisions of the Offshore Division By-Laws, before it is voted upon.[21] No member or

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[21] The carefully drafted, detailed provisions of the membership's Proposition No. 1 illustrate the complex considerations which must be taken into account in effecting the proposed dues reduction, and demonstrate the necessity of a deliberative or screening process. In contrast, SCAVO's Proposition No. 2 displays no consideration whatsoever of how that proposed amendment to the By-Laws will affect the Offshore Division ByLaws as a whole, and gives the membership no indication of the real effect of the amendment on the operation of the Offshore Division.

officer on his own, regardless of how good his intentions, can by-pass these orderly procedures and send out a proposed amendment for a referendum at union expense, merely on his personal judgment that such proposal would benefit the Offshore Division.

Moreover, the above-described procedures for formulating proposed amendments serve an additional purpose, that of safeguarding the Union treasury. Because the By-Laws permit adoption of amendments only by a secret majority mail ballot referendum, which must be conducted by an impartial balloting agency, the Union incurs substantial expense any time a referendum is initiated. Careful deliberation on and formulation of proposed amendments is necessary to catch errors and mistakes *before* such expenses are incurred; and to avoid having to repeat the referendum process a second time.[22]

Finally, as Judge Pierce recognized, the specific procedures set forth in Article XVIII of the By-Laws insure that proposed amendments to the Offshore Division By-Laws in fact originate from that body's own membership, and concern matters of interest to a substantial percentage of the membership or of their duly elected representatives. In the words of Judge Pierce, the provisions of Article XVIII:

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[22] In fact, Scavo's illegal attempt to send out, in rapid succession, three of his "ideas" for amending the Offshore Division By-Laws, without the approval of a majority of the Offshore Division Executive Council or of 15% of the membership and without using a Ballot Committee, has caused he Union to incur an unnecessary expense of thousands of dollars for the services of the American Arbitration Association, and has precipitated two other lawsuits (77 Civ. 510 and 77 Civ. 844, now pending before Judge Pierce; see footnote 4, p. 6, *supra*) entailing an unnecessary expense of thousands of dollars in legal fees and legal expenses.

". . . would have required 15 percent of the membership of the Offshore Division so that if the referendum was something that was of interest to at least that number of people or that percentage of people in the Offshore Division, you had the 15 percent which are said to have supported Johnson's proposition number 1, and if you compare that with the president's proposition number 2, that submission, you have even if it comes from some other members beyond himself, we don't know how many, or was it 15 percent or were they all Offshore Division. *Why isn't the provision of the By-Laws, the Offshore Division, more in keeping with this concept of democracy and representation, with respect to that division or the membership of that division.*" (JA 139) [Emphasis added].

4. Article VI, § 1(i) of the Constitution, when construed in light of other provisions of the Constitution and the Offshore Division By-Laws, does not encompass referenda to amend the By-Laws.

As noted above, the nature and structure of the Union require orderly procedures for the submission of proposed By-Laws amendments to the Offshore Division membership. These procedures—a screening process, a secret mail ballot referendum, a majority vote, and an impartial balloting agency—are provided by Article XVIII of the By-Laws. In contrast, Article VI § 1(i) contains none of the safeguards the union requires of a provision to amend the By-Laws. Thus, the Convention reasonably concluded that Article VI, § 1(i) does not pertain to referenda to amend the Offshore Division By-Laws.

Furthermore, Judge Pierce correctly noted that Article VI, § 1(i) contains none of the guarantees provided by Article XVIII of the By-Laws to insure that proposed amendments to the Offshore Division By-Laws originate from the Offshore Division membership itself, and are supported by a significant number of members or of their elected representatives. The interpretation rendered by the Convention, Judge Pierce concluded, was not only fair and reasonable but was wholly consistent with the democratic, representative structure by which the Union is governed under its Constitution and By-Laws.

Finally, principles of construction support the Convention's interpretation. In the construction of statutes and constitutions, it is a presumption of great force that the legislative body did not intend to be inconsistent with the Constitution. Black, Construction and Interpretation of Laws, §§ 104, 105 (2d Ed., 1911). Similarly, when construing constitutional and by-laws provisions together to reconcile them, that construction should be favored which gives effect to the plain language and clear intent of both provisions. In the instant case, construing Article VI, § 1(i) of the Constitution to apply to matters other than the amendment of the Offshore Division By-Laws is the only construction which does not do violence to the plain language and intent of either provision.

As demonstrated above, the Offshore Division By-Laws, Article XVIII, on their face provide the *exclusive* means of submitting proposed amendments to a referendum vote. The provision is phrased in absolute, exclusive language. Whereas the Convention's interpretation recognizes the plain meaning of "either . . . or", the interpretation proposed by SCAVO would render meaningless the terms "either . . . or" in Article XVIII of the By-Laws, and thus should not be permitted.

In addition, the maxim "*expressio unius est exclusio alterius*" is applicable to the By-Laws provision concern-

ing amendment of the By-Laws. Article XVIII specifies two and only two methods of submitting proposed amendments to a vote, and the express mention of these two methods—especially phrased in terms of "either . . . or" —is intended to exclude all other methods. Similarly, in Black, Construction and Interpretation of Laws, Section 72 (2d Ed., 1911), at page 221 it is said:

> "Particularly when a statute gives a new right or a new power, and provides a specific, full, and adequate mode of executing the power or enforcing the right given, the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort to any other mode of executing the power or of enforcing the right."

The Offshore Division By-Laws give the membership the right to amend their By-Laws by a majority vote, a right they would not otherwise have, and prescribe a "special, full, and adequate mode" of proposing By-Laws amendments. This specific mode excludes the right to propose amendments by any other means. SCAVO may not all by himself propose amendments to the By-Laws and submit them to a membership vote, by-passing the mode specified in the By-Laws.

Moreover, as indicated at p. 35, *supra*, footnote 19, Article VI § 1(i) of the Constitution must be construed so as to give full effect to other provisions of the Constitution, such as Article XI, § 3(a). SCAVO's position, that no qualification whatsoever may reasonably be read into Article VI § 1(i), would render superfluous another constitutional provision, as well as create needless conflict between the language of the By-Laws and the Constitution. The preferable, more reasonable construction is the one adopted by the Convention, that Article VI § 1(i) does not encompass matters, such as amendment of the Offshore Division By-Laws, which are specifically and appropriately provided for elsewhere in the Constitution and By-Laws.

For all the above reasons, Judge Pierce found the Convention's interpretation of the Constitution to be fair and reasonable. This conclusion was proper and should be affirmed.

C. SCAVO's Reading of Article VI, § 1(i) is Unreasonable and Contains Potential for Abuse and Frustration of the Democratic Processes of the Union.

We have shown above that the interpretation of Article VI, § 1(i) which was upheld by the International Convention and by the Court below is the correct and reasonable reading of that provision. SCAVO's interpretation of Article VI, § 1(i), in contrast, is unreasonable and, if adopted, would seriously threaten the democratic functioning of the Union, as demonstrated by SCAVO's actual use of his claimed authority so as to frustrate the legitimate desires of 15% of the Offshore Division membership.

SCAVO plainly utilized his claimed authority under Article VI, § 1(i) to deny the Offshore Division membership an opportunity to vote on Proposition No. 1, a By-Law amendment proposed by members of the Offshore Division and supported by 15% of the membership. Notwithstanding the Appellant's disingenuous claim that "union democracy will suffer a severe blow" if the Convention's Resolution is upheld, the facts are that SCAVO refused to let Proposition No. 1 go out to the membership unless he could add his own Proposition No. 2 to the same ballot; that SCAVO refused to send out Proposition No. 1 by itself when directed to do so first by the International Convention and then by Judge Pierce; that SCAVO unsuccessfully sought to stay the mailing of Proposition No. 1 pending this appeal; and that the plaintiffs were required to move to punish SCAVO for contempt, with leave of this Court, in order to have

Proposition No. 1 sent out to the membership. Thus, it is clear that SCAVO's claimed authority, and not the Convention's Resolution, poses the only "precedent" which threatens the democratic rights of the membership to "control . . . their own destiny." (Appellant's Brief, p. 14).

It must be emphasized that denying SCAVO the authority he claims, to initiate referenda to amend the Offshore Division By-Laws, in no way "abolishes" the Office of President or strips SCAVO of the essential attributes and functions of his office. A full reading of the MM&P Constitution makes it clear that the power to initiate By-Law amendments at will is not one of the basic, necessary powers of the Union's chief executive.[23]

Furthermore, the Convention did not deprive SCAVO of his access to or means of communicating with the membership.[24] On the contrary, the Convention's wholly reasonable interpretation leaves intact the essential "communication" aspect of Article VI, § 1(i), but correctly rules that SCAVO may not use this power to defeat a validly proposed By-Law amendment and may not circumvent the specific, exclusive procedures for amending the By-Laws which are provided in Article XVIII.

Finally, as Judge Pierce discerned, SCAVO's alleged power to rule by plebiscite is not an essential aspect of Union democracy and, indeed, may be highly undemocratic in its operation. Apart from SCAVO's actual

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[23] A brief glance at the list of enumerated powers set forth in Article VI, Section 1 dispels any notion that the International Convention's Resolution has left SCAVO only "the facade of the Office of President" (Appellant's Brief, p. 13).

[24] In addition, Article VI, Section 1(l) authorizes SCAVO to "serve as the Editor of the official publication of the Organization, 'The Master, Mate and Pilot'."

abuse of this claimed power, Judge Pierce noted that even the well-intentioned promulgation of proposed By-Law amendments from on high might not be "in keeping with this concept of democracy and representation, with respect to that division or the membership of that division." (JA 139). The Convention's interpretation, that the By-Laws may only be amended in accordance with the procedures set forth in Article XVIII of the By-Laws, is more in keeping with the concept of democratic self-government by the membership.

POINT III

The International Constitution Does Not Give SCAVO The Sole And Unreviewable Authority To Interpret The Constitution.

As demonstrated in Point II, above, the Court below found that the correct and resonable interpretation of Article VI, § 1(i) does not authorize SCAVO to bypass the exclusive procedures for the amendment of the Off-shore Division By-Laws set forth in Article XVIII of the By-Laws. This reading of the Constitution was confirmed by the International Convention, and the Court below properly refused to overturn the fair and reasonable interpretation rendered by the Union's highest tribunal.

SCAVO, however, argues that his reading of Article VI, § 1(i) must prevail over the International Convention's fair and reasonable interpretation because SCAVO, himself, has the supreme and final authority to interpret the Constitution and cannot be overruled by any higher governing body of the Union. We have previously refuted Defendant-Appellant's assertion that the Court below failed to make the proper inquiry and determination as to who is vested with the final power to interpret the Union Constitution. In this Point we will demonstrate

that the Court correctly concluded that the Inernational Convention, not the President, has the final authority to interpret the Constitution; and that SCAVO's claim to the contrary, based on Aricle VI, § 1(d), is untenable.

A. Article VI, § 1(d) Does Not Give SCAVO Sole And Unreviewable Authority To "Interpret The Constitution."

1. The basis for SCAVO's "Infallibility" Argument.

The purported source of SCAVO's alleged unreviewable authority to interpret the Constitution is Article VI, § 1(d) of the Constitution, which provides:

> "It shall be the duty of the International President and he is hereby authorized to:
>
> (d) decide on all points of law, interpretations of the Constitution, and/or grievances submitted to him by the subordinate bodies, after consulting with International Counsel. When the International President makes a decision or interpretation and/or orders a subordinate body to observe the laws, rules and regulations and the subordinate body refuses, the subordinate body shall be subject to suspension or revocation of its charter with the approval of the General Executive Board."

The plain import and intent of this provision is to direct and authorize the President to settle grievances within the organization *submitted to him by subordinate bodies*, and to give opinions on "points of law" or "interpretations" *submitted to him by subordinate bodies* and involving the Constitution, after consulting with International Counsel. This provision is merely one of a series of enumerated, limited duties and powers granted to the

International President under the Constitution, and cannot be read as an implied grant of general, unreviewable authority, as well be explained in greater detail below. It does *not* authorize the President to merely sit in his office, pick up the Constitution, and deliver infallible interpretations on whatever sections of the Constitution he wishes to interpret.

SCAVO, however, reads Article VI, Section 1(d) in just such a unique manner. According to his view, this provision gives him not a specific "duty" but a "right" generally to "interpret the Constitution", not only when called upon to do so by subordinate bodies as the provision specifies, but at any time, for any and all purposes. Furthermore, according to SCAVO, he is given the sole and unreviewable power in the Organization to interpret the Constitution.

Several consequences flow inevitably from SCAVO's contention. First of all and most obviously, as the Court below stated in its Opinion, SCAVO thereby gives himself "the sole and unreviewable authority to pass upon the propriety or constitutionality of his own actions." (JA 161). This is tantamount to unrestricted control and power within and over the organization. In SCAVO's view, the Constitution means whatever he says it means, and whatever action SCAVO takes is permissible under the Constitution if SCAVO says that it is. The Court below properly rejected this argument as contrary to the Union Constitution.

Secondly, because SCAVO insists that he alone can determine what the Constitution provides, then any person or governing body within the union who opposes his "interpretation" is trying to "amend the Constitution". Regardless of how unreasonable or contrary to plain meaning SCAVO's construction may be—no matter if SCAVO says that "up" is "down" and "night' is "day"—no superior representative governing body within the

union can overrule him, in his view. Furthermore, SCAVO argues, whenever the President makes a simple, plausible interpretation of the Constitution in the course of conducting the everyday affairs of the union, only the courts may overrule him (JA 109). This assertion was properly rejected by the Court below.

2. The plain language of the Constitutional provision does not give SCAVO the unreviewable authority to "interpret the Constitution."

We have previously indicated, and we here repeat, that the plain language of the first sentence of Section 1(d) merely directs SCAVO to rule on points of law or interpretations of the Constitution *submitted to him by subordinate bodies.* Only when called upon to do so by a subordinate body can the President "decide on" points of law, interpretations of the Constitution, and/or grievances, under Article VI, Section 1(d).

Moreover, this first sentence must be read in light of the second sentence of Section 1(d), which supports and *requires* the meaning set forth above. Under traditional principles for the construction of statutory or contract language, terms must be read *in pari materia*, in context, not as isolated fragments, and should be construed together so as to avoid inconsistency. Patterson, "The Interpretation and Construction of Contracts", 64 Colum. L. Rev. 833 (1964); Black, Construction and Interpretation of Laws (2d Ed., 1911).

The second sentence of this provision speaks of the step that is to take place after an issue is presented to the President by a subordinate body for a "decision or interpretation." The "decisions" or "interpretations" mentioned in this second sentence are clearly the very same decisions or interpretations the President is au-

thorized to make in the first sentence. The phrase which begins the second sentence, "when the International President makes a decision or interpretation", is necessarily dependent upon the reference in that sentence to compliance by a "subordinate body" for its grammatical and substantive meaning. Thus, the plain meaning of the second sentence is that after the President has made a decision or interpretation on an issue submitted by a subordinate body, the subordinate body must comply. This second sentence clearly completes the meaning of the first sentence, and mandates that the entire provision be read as applying to a decision by the President on matters *submitted to him by subordinate bodies;* no other construction would make any sense. In no way does this provision authorize the President to issue unsolicited rulings on the Constitution.

Finally, and significantly, even the limited authority given to the President by Article VI, § 1(d) as a whole to deal with matters submitted to him by subordinate bodies, is not final. The second sentence of Section 1(d) on its face states that the President's enforcing orders are subject to approval by the General Executive Board:

> "When the International President makes a decision or interpretation and/or orders a subordinate body to observe the laws, rules and regulations and the subordinate body refuses, the subordinate body shall be subject to suspension or revocation of its charter *with the approval of the General Executive Board.*" [Emphasis added].

Thus, even in this limited area, the President is not infallible, but rather is subject to the principle of review which is the touchstone of the structure of this union under the Constitution. It would be wholly unreasonable to derive any implication of "unreviewable authority to interpret", from a provision which so clearly reaffirms the power of the General Executive Board to review the President's orders.

B. The Constitution Does Give the International Convention Final and Supreme Authority to Interpret the Constitution.

The International Convention is expressly given great authority under the Constitution. It is the Union's highest governing body and tribunal, with the power of general judicial review. Article IV, CONVENTIONS, Section 1, provides:

> "The authority and power of this Organization is vested in the members thereof acting by and through their duly elected delegates meeting in Convention assembled.
>
> *Such Convention is the source of all true and legitimate authority over the Organization and possesses as such supreme and absolute power over same and all channels leading thereto.* It shall, *while in session, have the sole and exclusive power* to grant charters to subordinate bodies; to suspend or revoke for cause any charter so granted; *to hear and determine all appeals* and to enact laws and establish regulations to settle grievances from the subordinate bodies or members thereof in order to carry out in the most effective manner the objectives and purposes of this Organization. The Convention does not have the power to alter or amend the Constitution except as provided in Article X hereof." [Emphasis added]

The International Convention is plainly "supreme" over all other representative bodies and executive officers of the Organization. It is the most representative body in the Organization, consisting of forty-two duly elected delegates. The General Executive Board, (Article VII), "second only to the Convention in legislative and policymaking authority", is subject to the authority

of the Convention when it makes any rulings of law. The International Subcommittee, (Article VI, Section 4) which has full authority between meetings of the General Executive Board, is subject to both the General Executive Board and the International Convention. The International executive officers, finally, are at the lowest end of the power scale. The International President is a member, among others, of all these representative bodies.

The Convention also has the "sole and exclusive power" when it is in session to "hear and determine all appeals" from rulings by lesser bodies or officials in the Organization, and thus is the final judicial authority on the Organization's Constitution, By-Laws, rules and regulations. The Convention's general appellate power includes the power to review interpretations of the Constitution rendered by the President.

In *McNichols* v. *International Typographical Union*, 21 F.2d 497 (7th Cir. 1927), the Court found that the Union's International President could not send out his own amendment referendum in the face of a contrary ruling by the Executive Council (corresponding roughly to this Organization's International Subcommittee) even though the President claimed superior authority by virtue of his power to suspend International officers. Here, SCAVO is in defiance of a vote by the Union's International Convention, the highest Union tribunal and governing body. A *fortiori* the Convention's ruling must prevail.

C. Article VI, § 1(d) of the Constitution Must be Reconciled With Other Constitutional Provisions Giving The General Executive Board And The International Convention Broad Power Over All Matters Affecting The Organization.

As noted above, pages 52 and 53, the International Convention is given, by the Constitution, "supreme and absolute" authority over the Organization. This supreme authority means ultimate power to act on all matters, short of amending the Constitution, and necessarily means that the Convention's word on the Constitution is final. Furthermore, as noted previously, the Convention, while in session, has "the sole and exclusive power . . . to hear and determine all appeals." Article IV, Section 1. This further underlines the Convention's final judicial authority to review.

In addition, Article VII, Section 3 expressly gives the General Executive Board the next highest authority in the Organization, and the highest authority between conventions.

> "Second only to the Convention in legislative and policy-making authority, it shall act between Conventions on all matters related to the welfare of the Organization not specifically prohibited by this Constitution or restricted to action by the membership in referendum ballot *and shall decide on all questions of law.*" [Emphasis added.]

This authority granted to the General Executive Board includes the authority to decide on questions of law arising under the Constitution. Furthermore, Article IX, Section 5 grants individual members the right to appeal to the General Executive Board, as well as to the Convention, from discipline by a subordinate body. These provisions require that the General Executive Board have the power to interpret the Constitution, subject to the Convention's authority to review.

All the above grants of appellate power to the Union's highest and second-highest governing bodies would be rendered meaningless, however, by SCAVO's unreasonable interpretation of Article VI, Section 1(d). Thus, in light of these provisions, it is only further apparent that Article VI, Section 1(d) does not confer upon SCAVO the sole and unreviewable power to interpret the Constitution. On the contrary, SCAVO's exercise of power under Article VI § 1 must be subject to review by the Union's higher tribunals.

The Appellant argues in his brief that the *specifically* phrased grant of authority to SCAVO to interpret the Constitution must prevail over the *general* grant of the power of supreme judicial review to the International Convention, and to the General Executive Board between conventions. This argument is erroneous and irrelevant, however, for the "specific-general" rule of construction to which the Appellant refers applies only in cases where the specific grant of authority is *inconsistent or irreconcilable with* the general. Such is clearly not the case here. The Union Constitution's specific delegation to SCAVO of a limited power to interpret the Constitution —a power he would not otherwise have—is wholly consistent with the general power of appellate review possessed by the General Executive Board and the International Convention. The only sensible way to reconcile these provisions and to give full effect to their plain language is to conclude, as did the court below, that the President's interpretations are subject to review by the General Executive Board and by the International Convention.[25]

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[25] Moreover, the Appellant's argument in operation would make it impossible to grant *general* appellate review or *general* authority to any supreme governing body, for such power would necessarily give way to every specific delegation to a lesser official; instead, the powers of the Convention, e.g., would have to be specifically and exhaustively enumerated. The fallacy of the Appellant's position is apparent. General appellate jurisdiction includes the power to review specific exercise of authority.

D. The Consequences and Implications of SCAVO's Claimed Sole and Unreviewable Authority to Interpret the Constitution are Inconsistent With the Democratic Principles Which Underlie the Governance of the Union.

As stated previously, the consequences of SCAVO's theory about his authority under Article VI, § 1(d), are frightening. Not only would SCAVO hold the sole power to pass on the propriety or constitutionality of his own acts, but he would, in addition, have the power on his own to defy any resolution or action of even the International Convention with which he may disagree, merely by declaring it "illegal." The President would thus evade all control by the union's higher governing bodies, and, in a remarkable reversal of relative power positions, would place himself in the position of final review over the International Convention. These results are contrary to the Constitution of this organization, as Judge Pierce recognized in his opinion below (JA 161).

In the United States federal government, certain "checks and balances" give effect to the concept of limited, enumerated executive powers. Not only are elected officials subject to the ultimate "political" check of the popular vote, but they are also subject to the power of the legislature to pass laws binding them, and to constitutional review by tribunals.

In *United States* v. *Nixon*, 418 U.S. 683 (1974), for example, the President argued that he could not be required to produce certain subpoenaed tapes and documents because, as he interpreted the Constitution, he had an *absolute* "executive privilege", thus the exclusive, *unreviewable* power to interpret the scope of his privilege. The Supreme Court firmly rejected Nixon's claim that his determination of his own privilege was beyond review, and proceeded to review and severely restrict the

claimed privilege. Although "each branch of the government must initially interpret the Constitution," when the President interprets the law for himself, he comes before the courts for review just like any citizen.

The Constitution of the International Organization of Masters, Mates and Pilots similarly provides checks upon the power of the President and the Organization's governing bodies. Despite Appellant's assertions to the contrary, it is clear that the ultimate "check" in this Union is the International Convention. As shown throughout this memorandum, the principle of review by higher governing bodies is a characteristic of this Union's structure. Furthermore, the primacy of the largest, most representative body is both explicitly and impliedly provided in the Constitution. SCAVO's claim would effectively nullify the power of the Union's representative bodies and "upset the constitutional balance of a workable government," as the Court stated in *United States* v. *Nixon, supra.*

SCAVO's "interpretations" and actions are no more immune from constitutional review by the Convention, the Union's "supreme" authority, than were President Nixon's interpretations in the federal context. For all of the above reasons, SCAVO's claim of unrestricted authority under Article VI, § 1(d) is untenable.

CONCLUSION

It is respectfully submitted that the District Court's decision that the Resolutions of the International Convention were fair and reasonable interpretations of the International Constitution should be affirmed.

Respectfully submitted,

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